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# Civil Procedure: Notifying Justice: "Reasonable Actual Notice" in Service of Process—DeCook v. Olmsted Medical Center, Inc.

Paul Fling

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**CIVIL PROCEDURE: NOTIFYING JUSTICE:  
“REASONABLE ACTUAL NOTICE” IN SERVICE OF  
PROCESS—*DECOOK V. OLMSTED MEDICAL CENTER, INC.***

Paul Fling<sup>†</sup>

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I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>1</sup>

## I. INTRODUCTION

In *DeCook v. Olmsted Medical Center, Inc.*, the Minnesota Supreme Court issued a decision that may signal a shift towards a more pragmatic application of Minnesota's rules of service.<sup>2</sup> In *DeCook*, the court held that a party can properly amend a summons and complaint as long as it does not substantially burden the defendant.<sup>3</sup> In addition, the court held that alternative methods of service through an agent, such as e-mail, are sufficient if consented to by the defendant.<sup>4</sup> As part of this decision, the court held that the plaintiff has the initial burden of producing evidence to show an alternative method of service existed, which, if met, shifts the burden to the defendant to establish that the method of service was ineffective.<sup>5</sup>

This Note begins by giving a selected history of service and rules of civil procedure,<sup>6</sup> an overview of traditional and technology-aided ways of effectuating service,<sup>7</sup> and an overview of the history of notice pleading in federal and Minnesota state courts.<sup>8</sup> Next, this

1. *Thomas Jefferson Quotes*, GOODREADS, <http://www.goodreads.com/quotes/94629-i-am-not-an-advocate-for-frequent-changes-in-laws> (last visited Sept. 28, 2016).

2. *See DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263 (Minn. 2016).

3. *Id.* at 269.

4. *Id.* at 271–72.

5. *Id.* at 271.

6. *See infra* Section II.A.

7. *See infra* Section II.B.

8. *See infra* Section II.C.

Note explores the *DeCook* decision, discussing the facts of the case and the rationale of both the majority and dissenting opinions.<sup>9</sup>

Although this Note concludes that the majority came to the correct decision, justice would be better served if the court adopted what this author calls the “reasonable actual notice” standard.<sup>10</sup> Doing so, this Note contends, would better align with the policy behind both the Federal and Minnesota Rules of Civil procedure<sup>11</sup> and would allow for greater flexibility in a shifting legal landscape.<sup>12</sup> If Minnesota courts find it prudent to adopt the “reasonable actual notice” standard, this author proposes a modified burden-shifting framework that may better ensure disputes are resolved on their merits.<sup>13</sup>

## II. HISTORY OF THE RELEVANT LAW

### A. *General History of Service and the Rules of Civil Procedure*

Put simply, service occurs in a civil case when a party delivers legal documentation to the defendant being sued.<sup>14</sup> The core purposes of service are twofold: (1) to provide a court jurisdiction over the defendant and (2) to put the party being sued on notice of the lawsuit.<sup>15</sup>

In 1938, Congress adopted the Federal Rules of Civil Procedure, which included official rules for effective service.<sup>16</sup> In 1947, the Minnesota Supreme Court Advisory Committee prepared

9. See *infra* Part III.

10. See *infra* Part IV.

11. See *infra* Sections IV.A.1, 3.

12. See *infra* Section IV.A.2.

13. See *infra* Section IV.B.

14. *What Is Service of Process?*, THE LAW DICTIONARY, <http://thelawdictionary.org/service-of-process/> (last visited Sept. 28, 2016) (defining service of process as “the term for the delivery of a summons, writ or subpoena to the opposing party in a law suit”). Many may be familiar with the common phrase, “You’ve been served”—a phrase often used to depict a process server serving a party with legal documents. See Kimberly Faber, “You’ve Been Served.” *To Say it or Not to Say it?*, SERVENOW (Aug. 7, 2012), <https://www.serve-now.com/articles/1277/youve-been-served>. This phrase, however, is not required by law and is rarely said by process servers outside of television and film. See *id.*

15. *In re Skyline Materials, Ltd.*, 835 N.W.2d 472, 475 (Minn. 2013).

16. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 (1998).

a set of rules closely mirroring the federal rules.<sup>17</sup> Those rules, now known as the Minnesota Rules of Civil Procedure, were subsequently adopted by the Minnesota Supreme Court in 1952.<sup>18</sup> Changes to the Minnesota rules have been made throughout the years, primarily mirroring developments in the federal rules.<sup>19</sup>

Closely tied to the notion of service is the principle of personal jurisdiction: a court can exercise authority over a defendant only if it has personal jurisdiction over that defendant and adequate service of process has occurred.<sup>20</sup> In early American jurisprudence, a court's jurisdiction<sup>21</sup> could be established only if the defendant's property was located in the forum state or the defendant was personally served within the limits of the forum state.<sup>22</sup> Later, Justice Oliver Wendell Holmes reiterated the preference for personal service and cautioned against relying on service by publication.<sup>23</sup> Then, in 1945, the Supreme Court began a transition to a more flexible approach towards personal jurisdiction and service of process.<sup>24</sup> In *International Shoe Co. v. Washington*, the Court determined that personal jurisdiction over a defendant existed

17. David F. Herr & JoLynn M. Markison, *E-Discovery Under the Minnesota Rules: Where We've Been, Where We Might be Headed*, 40 WM. MITCHELL L. REV. 390, 393 (2014).

18. *See id.*

19. *Id.* at 393–94.

20. *See* Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 338–40 (2003) (giving a brief overview of the ways in which the notions of service of process and personal jurisdiction dovetailed during the nineteenth and twentieth centuries).

21. *See* *Pennoy v. Neff*, 95 U.S. 714, 722–23 (1877) (“And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory . . .”).

22. *See id.* at 727. The Court in *Pennoy* reasoned that the law assumes an individual is always in “possession” of his or her property, and if a court seizes it, that individual will be on notice of the seizure as well as the impending suit. *Id.* Thus, personal service is not necessary when seizure of the defendant's property located in the forum state occurs. *Id.*

23. *See* *McDonald v. Mabey*, 243 U.S. 90, 92 (1917) (“There is no dispute that service by publication does not warrant a personal judgment against a nonresident. . . . To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.” (internal citations omitted)).

24. *See* *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); Joelle Lee A. Nicol, Note, *Given an Opportunity to Redefine the Gray Area of “Minimum Contacts,” The Court in Prince v. Urban Chose to Remain in the Dark*, 25 W. ST. U. L. REV. 313, 315–16 (1998).

when the defendant “establish[ed] sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the defendant had] incurred there.”<sup>25</sup>

Additionally, in *International Shoe*, the Supreme Court appeared to expand on the notion of allowing different forms of service: “[i]t is enough that appellant has established such contacts with the state that the particular form of substituted service<sup>[26]</sup> adopted there gives reasonable assurance that the notice will be actual.”<sup>27</sup> When interstate commerce became more commonplace,<sup>28</sup> the Court further shifted focus to ensure that service provided a defendant with fair and reasonable notice of legal action.<sup>29</sup> In *Mullane v. Central Hanover Bank & Trust Co.*, the court laid out general principles for notice:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.<sup>30</sup>

The principles articulated in *Mullane* continue to guide the legal system’s view of service of process today.<sup>31</sup>

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25. *Int’l Shoe Co.*, 326 U.S. at 320.

26. “Substituted service” is defined as “service by leaving a copy of the process at the residence or abode or place of business of the defendant.” 72 C.J.S. *Process* § 70, Westlaw (databased updated Mar. 2017). Substituted service is “different and distinct from [personal service],” but “for some purposes substituted service is deemed equivalent to personal service.” *Id.*

27. *Int’l Shoe Co.*, 326 U.S. at 320.

28. *See, e.g., McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 220–23 (1957) (“With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines . . . ma[king] it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”).

29. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314–17 (1950) (reasoning that service by publication affords adequate service as long as it gives reasonable notice to defendant).

30. *Id.* at 314–15.

31. *See* Craig J. Knobbe, *Tenth Circuit Survey: Securities Law*, 76 DENV. U. L. REV.

## B. *Manners of Effectuating Service*

### 1. *Traditional*

Minnesota law has often reflected the stringent historical standards of effective service.<sup>32</sup> According to the Minnesota Rules of Civil Procedure, there are three primary ways of effectuating service on individuals.<sup>33</sup> First, personal service is valid when a summons is delivered personally to the individual, left at that person's place of abode,<sup>34</sup> or left with an agent authorized by statute to accept service on the defendant's behalf.<sup>35</sup> Traditionally, personal service is deemed ineffective if it is left with an agent who is not authorized to accept service.<sup>36</sup> Second, service can be made by mailing a summons and complaint to the defendant, provided the defendant returns an included acknowledgment of service form.<sup>37</sup> And third, in rare circumstances, service by publication constitutes valid service.<sup>38</sup>

Unless service is waived,<sup>39</sup> Minnesota commonly does not allow service that is not authorized by statute or Rule 4 of the Minnesota

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903, 904 n.10 (1999) (citing 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1074, at 465 (2d ed. 1987)) (“[*Mullane*] generally is recognized as the keystone of modern philosophy regarding the notice requirement and its importance should not be underestimated.”).

32. See, e.g., *Cabanne v. Graf*, 87 Minn. 510, 514–15, 92 N.W. 461, 462 (1902) (holding that serving a non-citizen of the state when that individual is not in the state is unconstitutional).

33. See MINN. R. CIV. P. 4.03, .04, .07.

34. See, e.g., *Berryhill v. Sepp*, 106 Minn. 458, 459, 119 N.W. 404, 405 (1909) (holding that usual place of abode is an individual's residence or the place he is living at the time of service).

35. MINN. R. CIV. P. 4.03(a).

36. See *Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 823 (Minn. Ct. App. 1999) (“[S]ervice on a party's attorney is ineffective unless the party has previously appointed the attorney to accept service.”).

37. MINN. R. CIV. P. 4.05.

38. MINN. R. CIV. P. 4.04; see also *Gill v. Gill*, 277 Minn. 166, 172, 152 N.W.2d 309, 313 (1967) (holding that service by publication is valid only if it is the sole option for effective service). For an in-depth discussion on service by publication in Minnesota, see Jessica Klander, Note, *Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process—Shamrock Development v. Smith*, 36 WM. MITCHELL L. REV. 241 (2009).

39. See, e.g., *Chauncey v. Wass*, 35 Minn. 1, 15, 30 N.W. 826, 831 (1886) (“[A] party . . . may waive anything intended for his benefit—such as notice, or service of process . . .”).

Rules of Civil Procedure.<sup>40</sup> Many federal courts, however, have deemed service effective as long as the federal rules of service are substantially complied with.<sup>41</sup> Similarly, despite usually adhering closely to the rules of service, Minnesota courts have considered service effective when the plaintiff substantially complies with the rules of service and the defendant has actual notice of suit.<sup>42</sup> Currently, in Minnesota, substantial compliance combined with adequate notice has been recognized only when service occurs at a defendant's usual place of abode.<sup>43</sup> According to the Minnesota Supreme Court, there is "no place [other than the defendant's residence] significantly more desirable for the papers to be left."<sup>44</sup>

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40. See, e.g., *Allen*, 590 N.W.2d at 822 (holding that service that is not authorized by Rule 4 is ineffective).

41. See, e.g., *Lavarias v. U.S. Dep't of the Navy*, No. 09-cv-00120DAE/RLP, 2011 WL 1361555, at \*3 (D. Haw. Apr. 11, 2011) (citing *SEC v. Ross*, 504 F.3d 1130, 1140 (9th Cir. 2007)) ("A court may exercise personal jurisdiction over a defendant if the plaintiff can demonstrate 'substantial compliance' with Rule 4. Actual notice, however, without substantial compliance with Rule 4, will not provide personal jurisdiction."); *Munson v. England*, No. 04-cv-0248-RRB/CMK, 2008 WL 162774, at \*2 (E.D. Cal. Jan. 17, 2008) ("Here, plaintiff substantially complied with Rule 4(i) by sending a copy of the summons and complaint to the U.S. Attorney's office. He addressed the envelope to the assistant U.S. Attorney assigned to this case, whom had contacted him previously, instead of addressed to the 'civil process clerk.' Given the need to liberally construe pro se pleading, the undersigned finds plaintiff substantially complied with Rule 4, and the U.S. Attorney's office was given actual notice."); *In re Chinin USA, Inc.*, 327 B.R. 325, 333 (Bankr. N.D. Ill. 2005) ("Substantial compliance with the service requirements of Rule 4 is sufficient so long as the opposing party receives sufficient notice of the complaint. Dismissal is generally not justified absent a showing of prejudice." (citations omitted)).

42. See, e.g., *Van Note v. 2007 Pontiac*, 787 N.W.2d 214, 220 (Minn. Ct. App. 2010) (holding that service was effective when officer had substantially complied with service rules by personally leaving notice at the defendant's place of abode with an individual who told the officer she would give the notice to defendant and defendant did in fact have actual notice of suit); *O'Sell v. Peterson*, 595 N.W.2d 870, 872-73 (Minn. Ct. App. 1999) (holding that when service is left at an individual's place of abode with an individual who has a "substantial nexus" with the defendant and the defendant has actual notice of suit, service is effective).

43. See *In re Disciplinary Action Against Coleman*, 793 N.W.2d 296, 302 (Minn. 2011) (citing *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988)) (holding that the rules governing service should be liberally construed when substitute service occurs at an individual's residence and that individual has notice of the suit); *Thiele*, 425 N.W.2d at 584 ("This 'actual notice' exception, however, has been recognized only in cases involving substitute service at defendant's residence.").

44. *Thiele*, 425 N.W.2d at 584 (citing 4 WRIGHT & MILLER, *supra* note 31,



Therefore, substantial compliance combined with actual notice is not sufficient when a defendant is served at his place of business.<sup>45</sup>

Recently, Minnesota courts further discussed the reach of actual notice. In *Jaeger v. Palladium Holdings, LLC*, a dispute concerning ineffective service for the foreclosure of a townhome, the Minnesota Court of Appeals found that a party need only substantially comply with the substitute service<sup>46</sup> requirements as long as the defendant has actual notice of suit.<sup>47</sup> In the subsequent appeal, the Minnesota Supreme Court addressed this issue, determining whether Rule 4.03(a) of the Minnesota Rules of Civil Procedure required strict compliance.<sup>48</sup> In its decision, the court determined that the court of appeals' reliance on *Thiele v. Stich* was misplaced.<sup>49</sup> According to the Minnesota Supreme Court, "the statement from *Thiele* was still dictum and therefore not binding on us."<sup>50</sup> Thus, the court relied on *MacLean v. Lasely* to determine that "substitute-service requirements are subject to strict compliance."<sup>51</sup> The court went on to quote *MacLean*, stating that "[i]n making such substitute service there must be a strict compliance with the statute."<sup>52</sup> The court in *MacLean* held that "statutory service is not dispensed with by the mere fact that defendant may in some way learn of the existence of the papers and an attempted service."<sup>53</sup> In turn, the *Jaeger* court determined that substitute service must be strictly complied with, regardless of the defendant's actual notice.<sup>54</sup>

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§ 1096, at 79).

45. *Id.* (citing *Thompson v. Kerr*, 555 F. Supp. 1090, 1093 (S.D. Ohio 1982)) ("Rule 4 is otherwise taken literally, and cannot be satisfied by service on [a] defendant's place of work or business.").

46. "[S]ubstituted service under Rule 4.03, Rules of Civil Procedure—that is, service upon an individual by leaving a copy at his usual place of abode with some person of suitable age and discretion then residing therein—is a form of 'personal' service. In fact, Rule 4.03 labels as personal this form of service." *Lebens v. Harbeck*, 308 Minn. 433, 434, 243 N.W.2d 128, 129 (1976); *see also* 72 C.J.S., *supra* note 26, § 70 (defining "substituted service").

47. No. A14-0803, 2015 WL 1513982, at \*1 (Minn. Ct. App. Apr. 6, 2015).

48. *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 608–10 (Minn. 2016).

49. *See id.* at 610–11 (citing *Thiele*, 425 N.W.2d at 584).

50. *Id.*

51. *Id.* at 609 (citing *MacLean v. Lasely*, 181 Minn. 379, 380, 232 N.W. 632, 632 (1930)).

52. *Id.* (quoting *MacLean*, 181 Minn. at 380, 232 N.W. at 632).

53. *Id.* (quoting *MacLean*, 181 Minn. at 380, 232 N.W. at 632).

54. *Id.*

Rule 3.01 of the Minnesota Rules of Civil Procedure governs when an action is commenced.<sup>55</sup> Each section of Rule 3.01 requires a particular form of service for the commencement of an action.<sup>56</sup> In 2015, the Minnesota legislature enacted an amendment to Rule 3.01(b), allowing for any method of service as long as the parties consent to the alternative method.<sup>57</sup> Thus, parties were given greater freedom in selecting a convenient method of service, which signaled a shift towards more practical means of service.

Currently, Minnesota courts rely on a burden-shifting method to determine if an alternative method of service was adequate.<sup>58</sup> First, to show that a different method of service was valid, the plaintiff is tasked with presenting evidence of an agreement.<sup>59</sup> If the plaintiff meets this burden, the burden shifts to the defendant to establish that service was improper.<sup>60</sup> Thus, a defendant fails to meet his burden if he produces no evidence to the contrary.<sup>61</sup>

## 2. *Using Technology*

Since 2000, worldwide internet use has risen dramatically.<sup>62</sup> Today, in the United States alone, nearly eighty-nine percent of the population has access to the internet.<sup>63</sup> The legal system, in turn,

55. See MINN. R. CIV. P. 3.01.

56. *Id.*

57. MINN. R. CIV. P. 3.01(b) advisory committee's comment to 2015 amendment (allowing for consent to e-mail service even though the rules do not specifically list it as effective service).

58. See, e.g., *Holmes v. Conter*, 212 Minn. 394, 395, 4 N.W.2d 106, 107 (1942) ("Defendants' counsel concedes that the burden is on him to overcome [proof of effective service] of the deputy sheriff by evidence which has been proven to be clear and satisfactory." (internal quotations and citations omitted)); *Godfrey v. Valentine*, 39 Minn. 336, 338, 40 N.W. 163, 164 (1888) (holding that when service by publication is on the record, other proof of service must be affirmatively shown); *Fish v. Janson*, No. A15-1949, 2016 WL 2946263, at \*4 (Minn. Ct. App. May 23, 2016) (holding that defendant did not meet his burden of showing that the residence where he was served was not his usual place of abode).

59. *Shamrock Dev., Inc. v. Smith*, 754 N.W. 2d 377, 384 (Minn. 2008).

60. *Id.*

61. *Id.*

62. See *Internet Users*, INTERNET LIVE STATS, <http://www.internetlivestats.com/internet-users/> (last visited Sept. 28, 2016). In the year 2000, 6.8% of the world's population had an internet connection; as of 2016, just over 46% of the world's population has an internet connection. *Id.*

63. See *id.* The United States' internet access has risen from 43% to almost 89% of the population in the past sixteen years. *Id.*

has adapted to this changing landscape and integrated technology use into legal proceedings as well as service of process.<sup>64</sup> For many years, courts authorized only traditional means of service, such as personal service, service by mail, or service by publication.<sup>65</sup> In 1980, however, a federal court first acknowledged the use of different technologies in service of process.<sup>66</sup> In *New England Merchants National Bank v. Iran Power Generation & Transmission Co.*, a federal court allowed service through “Telex”<sup>67</sup> to defendants in Iran because other means of service were not practicable.<sup>68</sup> In its opinion, the court reasoned that “[j]ustice demands that a substitute form of service be formulated—one calculated to provide defendants with adequate notice of the pendency and nature of the instant suits.”<sup>69</sup> Notably, the court opined that the legal system “cannot be blind to changes and advances in technology . . . . No longer must process be mailed to a defendant’s door when he can receive complete notice at an electronic terminal inside his very office . . . .”<sup>70</sup>

In the years following, courts sparingly authorized service through facsimile. For instance, in *In re International Telemedia Associates, Inc.*, a district court judge found that the defendant was

64. See, e.g., *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, U.S. CTS. (Dec. 9, 2013), <http://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts> (opining that programs such as PACER and electronic filing in the federal court system have “reduced stress” by implementing “an efficient system” that “[e]ven skeptics have grown to love”).

65. See *supra* Section II.A.

66. See *New England Merchants Nat’l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980).

67. *Telex*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/telex> (last visited Sept. 28, 2016) (defining Telex as “a system of communication in which messages are sent over long distances by using a telephone system and are printed by using a special machine (called a teletypewriter)”). Telex is essentially an early hybrid of the telegraph, text messaging, and facsimile. Many people, like this author, may have no idea what a Telex communication is or have never seen a “teletypewriter.” This arguably shows how important flexible rules governing service are, as any kind of technology (mail, fax, e-mail) could become obsolete in the not-so-distant future.

68. *New England Merchants*, 495 F. Supp. at 81. In this instance, the judge acknowledged there was little to no precedent for authorizing service via Telex. However, the judge found that the breakdown of American and Iranian relations coupled with the defendants’ avoidance of service made Telex an effective method of service. *Id.* at 80–81.

69. *Id.* at 81.

70. *Id.*

evading service and authorized facsimile as an alternate method of service.<sup>71</sup> Furthermore, *Telemedia Associates* was the first federal case that authorized e-mail as an alternative method of service.<sup>72</sup> Later, the Ninth Circuit Court of Appeals authorized the use of e-mail to serve an international online company that listed only an e-mail address on its website.<sup>73</sup> Following this decision, other courts set the general standard that service via e-mail could be authorized if other methods of service had proven unsuccessful.<sup>74</sup>

An illustrative example of technology's assistance in the legal field comes in the form of the "best notice practicable" standard in

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71. 245 B.R. 713, 718 (Bankr. N.D. Ga. 2000) (holding facsimile, among other methods, to be a proper alternative method of service because it was "virtually impossible" to locate the defendant and "effect service by any of the traditional means specified in the Federal Rules of Civil Procedure").

72. *Id.* at 722 ("Under the facts and circumstances of this case, the Trustee's service of process upon Diaz by facsimile transmission, electronic mail, and mail to his last known address provides a sufficient basis for the Court's exercise of personal jurisdiction over Diaz.").

73. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002). In its opinion, the court acknowledged that the only contact address for the defendant was an e-mail address, and thus, e-mail was the best method to apprise the defendant of the suit. The court went on to say:

RII had neither an office nor a door; it had only a computer terminal. If any method of communication is reasonably calculated to provide RII with notice, surely it is email—the method of communication which RII utilizes and prefers . . . . Indeed, when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, email may be the only means of effecting service of process. Certainly in this case, it was a means *reasonably calculated to apprise* RII of the pendency of the lawsuit, *and the Constitution requires nothing more.*

*Id.* (emphasis added). The court in *Rio Properties*, however, also discussed concerns about e-mail service, including limitations with the use of electronic signatures, confirming receipt of a message, and attaching exhibits to the service documentation. *Id.* Thus, the Ninth Circuit directed district courts to balance the limitations with the benefits in each dispute. *Id.*

74. *See, e.g.,* *Ryan v. Brunswick Corp.*, No. 02-cv-0133E(F), 2002 WL 1628933, at \*2 (W.D.N.Y. May 31, 2002) (finding service by electronic means constitutionally permissible and holding that "a party need not exhaust all possible methods of service" for a court to authorize electronic service but must show it has "reasonably attempted to effectuate service on the defendant(s)"); *Hollow v. Hollow*, 747 N.Y.S.2d 704, 705, 707–08 (Sup. Ct. 2002) (authorizing service by e-mail in divorce proceedings when defendant moved to Saudi Arabia and plaintiff "exercised due diligence" by trying to serve defendant through his employer and through an international process service).

class action lawsuits.<sup>75</sup> *Eisen v. Carlisle & Jacquelin* is a widely influential case on the “best notice practicable” requirement.<sup>76</sup> In *Eisen*, the Supreme Court held that it was mandatory to include individual notice to class members who can be identified through reasonable efforts.<sup>77</sup> Courts, however, have hesitated to set a standard for those who cannot be identified through reasonable effort.<sup>78</sup> In the twenty-first century, new technology—especially the internet—has shaped the legal system’s view of what constitutes best practicable notice.<sup>79</sup> For instance, some courts have

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75. The concerns regarding giving notice to a large number of plaintiff class members is admittedly different than the concerns regarding giving adequate notice to individual defendants. However, the seminal case for both class actions and service of process is widely considered to be *Mullane v. Central Hanover Bank*. See 339 U.S. 306 (1950). Both service of process and decisions regarding class actions rely on Justice Jackson’s stated principle that “the fundamental requisite of due process of law is the opportunity to be heard.” *Id.* at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Notably, *Mullane*’s principles have been codified in Rule 23 of the Federal Rules of Civil Procedure, governing class actions, while they have not been codified in Rule 4, governing service. See FED. R. CIV. P. 23(c) advisory committee’s note to 1966 amendment. Nonetheless, courts today continue to use the standards set out in *Mullane* for service of process analysis without those standards being expressly codified in the rules governing service. See Knobbe, *supra* note 31, at 904 n.10.

76. Brian Walters, “Best Notice Practicable” in the Twenty-First Century, 2003 UCLA J.L. & TECH. 1, 4 (2003) (“The most influential case on the ‘best notice practicable’ requirement of FRCP 23(c)(2) is *Eisen v. Carlisle & Jacqueline*.”).

77. 417 U.S. 156, 176 (1974) (“Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action.”).

78. See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (citing *In re Franklin Nat’l Bank Sec. Litig.*, 599 F.2d 1109 (2d Cir. 1978)) (“What is ‘the best notice practicable under the circumstances’ and what constitutes ‘reasonable effort’ is a determination of fact to be made in the individual litigation.”).

79. See generally Robert H. Klonoff et. al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2008) (discussing the opportunity the internet gives to class members to participate actively in class action litigation); Jennifer Mingus, *E-Mail: A Constitutional (and Economical) Method of Transmitting Class Action Notice*, 47 CLEV. ST. L. REV. 87 (1999) (discussing the due process implications, practicality, and cost savings of e-mail, as well as the difficulties courts have had embracing use of e-mail for notice in class action litigation).

increasingly accepted the use of e-mail as best practicable notice.<sup>80</sup> With technological growth and society's increasing dependence on technology, courts have begun to interpret the best practicable notice standard as allowing, and at times requiring, the use of newer technology in class action notice.<sup>81</sup> Thus, because an individual's due process rights may be violated if notice is not proper, some courts have adapted to societal change and found newer technological means to be the "best practicable notice under the circumstances."<sup>82</sup> As illustrated in the following paragraph, the area of service may already be experiencing a similar adaptation.

In general, Minnesota has mirrored federal courts' adoption of technology in its rules of civil procedure.<sup>83</sup> In 1996, the Minnesota Rules of Civil Procedure first included a mechanism for service by facsimile.<sup>84</sup> Without consent, however, facsimile remains an ineffective method of service in Minnesota.<sup>85</sup> It was not until

80. See, e.g., *Keirsev v. eBay, Inc.*, No. 12-cv-01200-JST, 2014 WL 644697, at \*1 (N.D. Cal. Feb. 14, 2014) ("The Court already preliminarily approved the form of class notice, primarily through email . . . . Moreover, information about the case has been available at the class website and through internet news sources. The Court finds that the form and method of notice was proper."); see also Elizabeth M.C. Scheibel, *#rule23 #classaction #notice: Using Social Media, Text Messaging, and Other New Communications Technology for Class Action Notice and Returning to Rule 23(c)(2)(b)'s "Best Notice Practicable" Standard*, 42 MITCHELL HAMLINE L. REV. 1331, 1349 (2016) (providing examples of e-mail being used for notice).

81. See, e.g., *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 449 (S.D.N.Y. 2004) (holding that notice via the internet, combined with other forms of notice, such as mail, constituted adequate notice).

82. See, e.g., *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) ("[N]ewspaper notice alone is not always an adequate alternative to individual notice. The World Wide Web is an increasingly important method of communication, and, of particular pertinence here, an increasingly important substitute for newspapers." (internal citations omitted)).

83. See *Herr & Markison*, *supra* note 17, at 394.

84. See MINN. R. CIV. P. 5.02(c) advisory committee's note to 1996 amendment ("Most of Rule 5.02 is new and for the first time provides for service by facsimile . . . . Service by facsimile has become widely accepted and is used in Minnesota either by agreement or presumption . . . . [But] express authorization for service by facsimile is appropriate and preferable . . . .").

85. See, e.g., *Kmart Corp. v. Cty. of Clay*, 711 N.W.2d 485, 490 (Minn. 2006) ("Because facsimile service is not authorized for service of initiating documents in the rules of civil procedure, we agree with the tax court that faxing the petitions to the offices of the county assessor and the county attorney did not effect valid service."); *Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 822 (Minn. Ct. App. 1999) (citing *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 311 (Minn. 1997)) ("Facsimile transmission of a summons is not permitted under rule 4. Service was

2015 that the Minnesota rules committee acknowledged e-mail as a method of service.<sup>86</sup> The rules committee amended Rule 3.01(b) to allow for service “made by mail or other means consented to by the defendant.”<sup>87</sup> The comment to the amendment specifies that “a party may consent to service by ordinary electronic mail even though the rules do not otherwise provide for it.”<sup>88</sup> Although an agreement must be in place, this change signals an acknowledgement of the prevalence new technology has in the legal world.<sup>89</sup>

### 3. *Amending Service*

An overview of methods of service would not be complete without discussing the ability to amend a chosen method of service. The Federal Rules of Civil Procedure provide courts the discretion to allow a party to amend service, pleadings, motions, and the like.<sup>90</sup> Similarly, as early as 1890, Minnesota courts and rules have also allowed procedural amendments.<sup>91</sup> For instance, in *Lockway v. Modern Woodmen of America*, the Minnesota Supreme Court held that a summons could be amended to cure an inadvertent mistake.<sup>92</sup> Today, Rule 4.07 of the Minnesota Rules of Civil Procedure governs the amendment of documents that have been

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therefore ineffective, and the district court did not have personal jurisdiction over Allen.”).

86. See MINN. R. CIV. P. 3.01(b) advisory committee’s note to 2015 amendment (“This rule is amended to add the explicit provision for consent to service by any means in subdivision (b), not only service by mail. If the party to be served consents to service, the service is effective and constitutionally sound regardless of method. Thus, a party may consent to service by *ordinary electronic mail even though the rules do not otherwise provide for it.*” (emphasis added)).

87. *Id.*

88. See *id.*

89. See generally Svetlana Gitman, *(Dis)service of Process: The Need to Amend Rule 4 to Comply with Modern Usage of Technology*, 45 J. MARSHALL L. REV. 459 (2012) (discussing the prevalence of technology in the American legal system and proposing the theory that service through technological means would better satisfy due process in certain situations).

90. See, e.g., FED. R. CIV. P. 4(a)(2) (“The court may permit a summons to be amended.”); FED. R. CIV. P. 4(l)(3) (“The court may permit proof of service to be amended.”).

91. See, e.g., *Burr v. Seymour*, 43 Minn. 401, 402, 45 N.W. 715, 716 (1890) (“The power of the court to amend the record in such a case cannot be doubted.”).

92. 116 Minn. 115, 118, 133 N.W. 398, 399 (1911).

served. Rule 4.07 allows for amendment of summons, other process, or proof of service if the court, in its discretion, determines that a party's substantial rights will not be prejudiced.<sup>93</sup> Thus, amendments are encouraged to help ensure a dispute is resolved on its merits and not simply dismissed on a mere technicality.<sup>94</sup>

### C. *The Notice Pleading Standard*

When the Federal Rules of Civil Procedure were adopted in 1938, a more flexible standard of pleading was introduced.<sup>95</sup> In fact, Rule 8, governing pleadings, calls only for "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>96</sup> Although initially challenged, the rule governing pleadings remained unchanged.<sup>97</sup> In 1957, in *Conley v. Gibson*, the Supreme Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim . . . ."<sup>98</sup> For the most part, courts followed the standard laid out in *Conley v. Gibson*.<sup>99</sup>

93. MINN. R. CIV. P. 4.07; see also *Nelson v. Glenwood Hills Hosps.*, 240 Minn. 505, 514, 62 N.W.2d 73, 79 (1953) ("[A]mendments shall be given freely when justice so requires.").

94. Cf. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) ("[T]he requirements of the rules of procedure should be liberally construed and . . . 'mere technicalities' should not stand in the way of consideration of a case on its merits."). Furthermore, invoking this very same principle, the Minnesota Supreme Court, in *DeCook*, determined that if the defendant is not substantially prejudiced, a plaintiff may amend a summons that was not signed by an attorney licensed to practice in Minnesota to include a signature of an attorney admitted to the Minnesota Bar. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 269 (Minn. 2016).

95. Cf. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1218 (3d ed. 2013) ("[T]he federal rules were intended to remove the rigidity of the codes and common law and allow the pleader to use his own judgment about how to tell his story.").

96. FED. R. CIV. P. 8(a)(2).

97. See, e.g., Jason A. Cantone et. al., *Whither Notice Pleading?: Pleading Practice in the Days Before Twombly*, 39 S. ILL. U. L.J. 23, 28 (2014) ("[In 1955] [t]he Advisory Committee stated that the original rule 'adequately sets forth the characteristics of good pleading . . . and requires the pleader to disclose adequate information as the basis of his claim for relief . . . .'").

98. 355 U.S. 41, 45–46 (1957).

99. Cantone, *supra* note 97, at 29–32 (discussing how the Supreme Court



In 2007 and 2009, however, the Court issued decisions widely regarded as heightening pleading standards. In *Bell Atlantic Corp. v. Twombly*, the Court held that *Conley* “ha[d] earned its retirement” and a complaint must plead “enough facts to state a claim of relief that is plausible on its face.”<sup>100</sup> Two years later, in *Ashcroft v. Iqbal*, the Court further clarified these standards when it held that conclusory statements or mere recitals of elements in a complaint will not survive a motion to dismiss.<sup>101</sup>

When the United States Supreme Court introduced its “plausibility” standard for pleadings, many states followed suit;<sup>102</sup> Minnesota, however, did not.<sup>103</sup> The Minnesota rule governing pleading states, in part, that “a pleading which sets forth a claim for relief . . . shall contain a short and plain statement of the claim

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largely followed the pleading standard it laid out in *Conley* in the fifty years after its decision). *But see* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) (discussing how federal courts imposed non-rule heightened pleading standards after *Conley*).

100. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, 570 (2007). Interestingly enough, the Court in *Twombly* made it clear that it was not applying a heightened standard of pleading, likely confusing many commentators, legal scholars, and law students alike. *See id.* at 569 n.14.

101. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In setting this standard, the Court introduced a two-pronged approach when considering a motion to dismiss: first, a court must remove all pleadings that are mere conclusions; then, a court will consider “well-pleaded factual allegations” and “determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679.

102. *See, e.g.,* Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) (“We agree with the Supreme Court’s analysis of the *Conley* language, which is the language quoted in our decision in *Nader v. Citron* . . . and we follow the Court’s lead in retiring its use.”); *Doe v. Bd. of Regents of Univ. of Neb.*, 788 N.W.2d 264, 278 (Neb. 2010) (“[W]e hold that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.”); *Sisney v. Best Inc.*, 754 N.W.2d 804, 809 (S.D. 2008) (“[W]e adopt the Supreme Court’s new standards.”). *But see, e.g.,* *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 347 (Ariz. 2008) (declining to adopt the *Twombly-Iqbal* “plausibility” standard); *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608 (Iowa 2012); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 437 (Tenn. 2011); *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 863 (Wash. 2010).

103. *See* Stephen C. Rathke, *Pleadings Plain or Plausible: Minnesota Claims Survive Twombly/Iqbal Challenge*, BENCH & B. MINN. (Oct. 8, 2014), <http://mnbenchbar.com/2014/10/pleadings-plain-or-plausible/> (discussing that the Minnesota Supreme Court has refused to adopt the *Twombly-Iqbal* standard that is now used in federal courts).

showing that the pleader is entitled to relief and a demand for judgment for the relief sought.”<sup>104</sup> This rule highlights Minnesota’s notice pleading standard—one that is met as long as documents involved in pleading put the party being sued on reasonable notice of legal action.<sup>105</sup> Thus, Minnesota continues to follow the original notice pleading standard laid out in *Conley v. Gibson* and has refused to adopt *Twombly-Iqbal*’s “plausibility” standard.<sup>106</sup> It is therefore important to address the history of Minnesota’s notice pleading standard and the state’s rejection of the *Twombly-Iqbal* standard.

In 1963, the Minnesota Supreme Court issued a decision, *Northern States Power Co. v. Franklin*, making it clear it intended to follow the standard of notice pleading laid out in the Federal Rules of Civil Procedure.<sup>107</sup> This standard remained unchallenged until the *Twombly* and *Iqbal* decisions of 2007 and 2009, respectively.<sup>108</sup> In

104. MINN. R. CIV. P. 8.01.

105. See *Hansen v. Robert Half Int’l, Inc.*, 813 N.W.2d 906, 917–18 (Minn. 2012) (“Minnesota is a notice-pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.”).

106. See, e.g., *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014).

107. 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963). The court, in its decision, clearly laid out the purpose of Rule 8 and the way in which it governs pleadings in Minnesota courts:

One of the fundamental changes intended by the adoption of our Rules of Civil Procedure, particularly as embodied in Rule 8, was to permit the pleading of events by way of a broad general statement which may express conclusions rather than, as was required under code pleading, by a statement of facts sufficient to constitute a cause of action. The functions of a pleading today are simply to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader’s theory upon which his claim for relief is based . . . . No longer is a pleader required to allege facts and every element of a cause of action. A claim is sufficient against a motion to dismiss based on Rule 12.02(5) if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.

*Id.* at 394–95, 122 N.W.2d at 29.

108. Cf. Paul E. D. Darsow, *Resolving the Bahr-Hebert-Franklin Paradox: Considerations for Applying Twombly and Its Progeny to Pleading and Rule 12 Motion Practice in Minnesota’s State Courts*, 36 HAMLINE L. REV. 437, 440 (2013) (“*Twombly*

2008, the Minnesota Supreme Court first cited *Twombly* in *Hebert v. City of Fifty Lakes*.<sup>109</sup> Two years later, the court further addressed *Twombly* when it decided *Bahr v. Capella University*.<sup>110</sup> These decisions created tension between the *Franklin* standard and the standard many inferred from *Hebert* and *Bahr*.<sup>111</sup>

In 2014, the Minnesota Supreme Court resolved this tension when it decided *Walsh v. U.S. Bank, N.A.*<sup>112</sup> *Walsh* addressed whether the plaintiff's claim of insufficient service should survive the pleading stage.<sup>113</sup> In its decision, the Minnesota Supreme Court expressly rejected the plausibility standard and held that the plaintiff's complaint sufficiently stated a claim for relief.<sup>114</sup> First, the court determined that the plain language of Rule 8.01 does not include the word "plausible" in any sense.<sup>115</sup> Second, the court

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and its progeny represent a profound change in pleading and Rule 12 motion jurisprudence which is impacting pleading and quite possibly Rule 12 motion practice in Minnesota's state courts.").

109. 744 N.W.2d 226, 235 (Minn. 2008). *Hebert*, however, relied heavily on the generous pleading standards laid out in *Franklin* and determined that the pleadings contained enough facts to state a claim for relief. *Id.* The court only included *Twombly* in a "see also" citation for the proposition that a pleading containing only legal conclusions will not survive a motion to dismiss. *Id.*

110. 788 N.W.2d 76, 80 (Minn. 2010). Here, the court seemed to consider a plausibility threshold in its analysis when it wrote, "[W]as Bahr's opposition based on a legal theory and facts that are *plausible*? Bahr cannot merely claim a reasonable belief that the practices she opposed were forbidden by the MHRA and thereby avoid scrutiny of her claim." *Id.* at 82 (emphasis added).

111. *Hebert* and *Bahr*, by referencing the heightened "plausibility" standard that deviates from *Franklin*'s notice pleading standard, seemingly created a tension between the two schools of thought in Minnesota's legal community. See Darsow, *supra* note 108, at 440 (discussing the need for the court to resolve what the author deems the "*Bahr-Hebert-Franklin* paradox").

112. See 851 N.W.2d 598, 600 (Minn. 2014) ("We granted review in this case to decide a question of great interest and consequence to parties and their lawyers in civil cases: whether the plausibility standard announced in *Bell Atlantic Corp. v. Twombly* . . . and *Ashcroft v. Iqbal* . . . applies to civil pleadings in Minnesota state court. We conclude that it does not."); Rathke, *supra* note 103, at 24 ("On August 6, 2014, the Minnesota Supreme Court answered the question in *Walsh v. U.S. Bank, N.A.* The court determined that no compelling reason exists to depart from the traditional pleading standard for civil actions (short and plain) by following *Twombly/Iqbal* and declined to do so.").

113. *Walsh*, 851 N.W.2d at 601.

114. *Id.* at 606–07 ("Accordingly, we decline to adopt the plausibility standard . . . . Therefore, Walsh's complaint satisfies the traditional pleading standard for civil actions in Minnesota.").

115. *Id.* at 604 ("Noticeably absent from Rule 8.01—and, for that matter, from

determined that the plausibility standard is out of line with the purpose and history of Minnesota Rule 8.01 “as a preference for non-technical, broad-brush pleadings.”<sup>116</sup> And third, *Walsh* established five reasons for why the context of Rule 8.01 does not align with the plausibility standard.<sup>117</sup> Ultimately, the court held that U.S. Bank did not produce a compelling reason for adopting the plausibility standard.<sup>118</sup> Thus, Minnesota courts today continue to adhere to the traditional, less stringent notice pleading standard.<sup>119</sup>

### III. THE *DECOOK* DECISION

#### A. *Facts and Procedure*

On January 22, 2010, medical personnel at Olmsted Medical Center delivered Jennifer and Ryan DeCook’s daughter, Mya DeCook.<sup>120</sup> Four years later, in January 2014, the DeCooks attempted to bring a medical malpractice suit against Olmsted Medical Center (“Olmsted”) and several individual employees:

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the rest of our rules of civil procedure—is the word ‘plausible’ or any variation of it. U.S. Bank does not, and cannot, provide a textual basis for converting the words ‘showing’ and ‘entitled’ into a plausibility standard.”).

116. *Id.* at 605 (“[The plausibility standard] raises the bar for claimants . . . and thereby conflicts with Rule 8.01’s preference for non-technical broad-brush pleadings.”).

117. *Id.* at 605–06. The five reasons the court gave were: (1) if a rule requires more specific factual pleading, such as Rule 9 governing “Pleading Special Matters,” it will expressly say so; (2) the “rules of civil procedure express a strong preference for short statements of fact in complaints”; (3) the given sample complaints demonstrate a preference for short and simple statements of fact; (4) the rules already provide for steps to ensure a complaint is not overly vague; and (5) there are already mechanisms in place to reduce the cost of discovery. *Id.* Some may question the Minnesota Supreme Court’s given reasons because both the federal and Minnesota rules governing pleadings contain identical text. However, the court specifically addressed this concern when it wrote, “We decline to [adopt the plausibility standard] despite the fact that the relevant text of Fed. R. Civ. P. 8(a)(2) is identical to the text of Minn. R. Civ. P. 8.01. The similarities between the federal rules and our rule make *Twombly* and *Iqbal* ‘instructive,’ but not binding.” *Id.* at 603 (internal citations omitted).

118. *Id.* at 604 (“The relevant text of Rule 8.01 is the same today as it was when *Olson* and *Franklin* were decided. U.S. Bank has not presented a compelling textual reason to overrule those cases.”).

119. *Id.*

120. *DeCook v. Olmsted Med. Ctr., Inc.* 875 N.W.2d 263, 265 (Minn. 2016).

Brenda Hanson, Darlene Pratt, Kenneth Palmer, Jack Perrone, Kimberly McKeon, and Ashley Morrow.<sup>121</sup>

The DeCooks' attorneys, Stephen Offutt and Patrick Thronson, contacted Olmsted in January of 2014 in an attempt to commence service on the defendants.<sup>122</sup> At that time, Barbara Graham, Olmsted's compliance officer, informed Offutt and Thronson that she was authorized to accept service for each defendant and was willing to do so by e-mail.<sup>123</sup> On January 14, 2014, the DeCooks' attorneys emailed a copy of the summons and complaint to Graham.<sup>124</sup> The following day, on behalf of all defendants, Graham returned a signed acceptance of service form to Offutt and Thronson.<sup>125</sup>

In response, on January 31, 2014, the defendants filed a Joint and Separate Motion to Dismiss.<sup>126</sup> In their accompanying memo, which was not filed until March 4, 2014, the defendants argued, in part, that: (1) the summons and complaint were defective; (2) the defendants were not served personally; and (3) the claimed service by e-mail was ineffective.<sup>127</sup> Furthermore, the defendants filed two affidavits from Graham, neither of which included a denial that any of the six individual defendants had authorized her to accept service on their behalf.<sup>128</sup>

121. DeCook v. Olmsted Med. Ctr., No. 55-cv-14423, 2014 WL 4798500 at \*1–2 (Minn. Dist. Ct. June 25, 2014), *aff'd*, No. A14-1180, 2015 WL 1880319 (Minn. Ct. App. Apr. 27, 2015), *aff'd in part, rev'd in part sub nom.* DeCook v. Olmsted Med. Ctr., Inc., 875 N.W.2d 263.

122. DeCook, 875 N.W.2d at 265. In addition, a minor point of contention in DeCook was whether a summons and complaint could be amended when they were only signed by an attorney not licensed to practice law in Minnesota. *Id.* Ultimately, the court, in its discretion, determined that the defendants were not prejudiced by allowing amendment of the summons and complaint. *Id.* at 267–68. Although a discussion regarding amending service is applicable to this author's larger argument, the contention surrounding the specific signature is not discussed further in this Note.

123. DeCook, 2014 WL 4798500 at \*1.

124. DeCook, 875 N.W.2d at 265.

125. *Id.*

126. The defendants based their Motion to Dismiss on Minn. R. Civ. P. 12.02(b), (c), and (d) for lack of personal jurisdiction, insufficient process, and insufficient service of process, respectively. *Id.*

127. *Id.* at 265–66.

128. *Id.* at 266. In addition, none of the defendants offered an affidavit showing they had not given Graham authorization to accept service on their behalf via e-mail. *Id.*

After learning of the defendants' motion to dismiss, counsel for the DeCooks sent copies of the summons and complaint to the appropriate sheriff's offices in an attempt to serve the defendants personally.<sup>129</sup> Pratt was served personally on February 24, 2014; Hanson was served personally on February 27, 2014; and the summons and complaint were left with an employee at Olmsted on February 27, 2014, in an attempt to serve the remaining individual defendants.<sup>130</sup>

The DeCooks first learned that the defendants objected to the purported defective summons and complaint when, on March 4, 2014, the defendants filed their memorandum accompanying their motion to dismiss.<sup>131</sup> In response, the DeCooks sent an amended summons and complaint to the appropriate sheriff's offices to effectuate personal service.<sup>132</sup> Once again, Pratt and Hanson were personally served while the summons and complaint were left with an Olmsted employee for the remaining defendants.<sup>133</sup>

At the district court level, the court denied the defendants' motion to dismiss for insufficiency of process and allowed the plaintiffs to amend their complaint.<sup>134</sup> Furthermore, the court denied defendants' motion to dismiss for insufficiency of service of process as to Olmsted, Pratt, and Hanson, as they were served in person.<sup>135</sup> The district court, however, granted the motion to dismiss as to the remaining four defendants.<sup>136</sup>

In response, Olmsted, Pratt, and Hanson appealed the decision, arguing that the summons and complaint were ineffective and the opportunity to amend should not have been given.<sup>137</sup> The

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129. *Id.*

130. *Id.*

131. DeCook v. Olmsted Med. Ctr., No. 55-cv-14423, 2014 WL 4798500, at \*2 (Minn. Dist. Ct. June 25, 2014). In addition, the DeCooks attempted to contact the defendants' attorneys to determine why they filed a motion to dismiss but were unsuccessful in doing so. *Id.*

132. *DeCook*, 875 N.W.2d at 266.

133. *Id.*

134. *DeCook*, 2014 WL 4798500, at \*3.

135. *Id.* at \*1. The court reasoned that Graham was authorized to accept service on Olmsted's behalf as Olmsted did not have an agent on file to accept service. *Id.* at \*5.

136. *Id.* at \*1. Their motion to dismiss was granted on the grounds that they were not personally served and service through Graham was ineffective. *Id.* at \*1, \*5–6.

137. *DeCook*, 875 N.W.2d at 266.

DeCooks cross-appealed, arguing that the e-mail sent to Graham on January 14, 2014, constituted effective service for all defendants.<sup>138</sup> The court of appeals affirmed the district court's decision, and the state supreme court granted review of both appeals.<sup>139</sup>

Arguing before the Minnesota Supreme Court, the defendants asserted that a valid summons did not exist and the district court abused its discretion in allowing the amended process.<sup>140</sup> The supreme court, however, found these arguments unconvincing because the Minnesota Rules of Civil Procedure and the policies behind the rules supported the lower court's decision.<sup>141</sup> Based on the district court's discretion and the fact that the defendants were not prejudiced by the amended summons and complaint, the supreme court affirmed the court of appeals' decisions and held that a defective summons and complaint can be amended.<sup>142</sup>

On cross-appeal, the DeCooks argued that service via e-mail through Graham on behalf of all defendants was made effective by agreement.<sup>143</sup> The DeCooks, the court found, had offered evidence of a valid alternative agreement with Graham, while the defendants offered no evidence to contradict the DeCooks' evidence.<sup>144</sup> In turn, the Minnesota Supreme Court concluded that the district court erred in finding that the record had no evidence of an alternative agreement, reversed the lower court's decision in part, and remanded the case to the district court to proceed against the previously dismissed defendants.<sup>145</sup> Thus, the majority held that alternative e-mail service via an agent can be effective.<sup>146</sup>

### *B. The Rationale of the Majority Opinion*

In its analysis, the majority considered the plain language of Rules 4.01, 4.07, and 11.01.<sup>147</sup> In doing so, it concluded that the district court was within its discretion to allow the amendment of a

138. *Id.*

139. *Id.*

140. *See id.* at 267–69.

141. *See id.* at 267–70.

142. *Id.* at 272.

143. *Id.* at 270.

144. *Id.* at 271.

145. *Id.* at 272.

146. *See id.*

147. *See* MINN. R. CIV. P. 4.01, 4.07, 11.01; *DeCook*, 875 N.W.2d at 266–68.

defective summons and complaint.<sup>148</sup> Furthermore, the court reasoned that discretionary amendments help ensure that cases are solved on “their merits rather than . . . by dismissal on technical grounds.”<sup>149</sup> Ultimately, the majority concluded that the defendants were not prejudiced by the amendment because they were on notice of the suit and the plaintiffs promptly corrected their mistake.<sup>150</sup>

The main point of contention in *DeCook*, however, arose in the discussion of the second issue: insufficient service. The majority and dissent disagreed as to whether the district court erred in ruling in favor of individual defendants Palmer, Perrone, McKeon, and Morrow for insufficient service.<sup>151</sup>

The majority held that parties can agree to forego formal service,<sup>152</sup> and agreement can provide for service via e-mail through an agent on the defendants’ behalf.<sup>153</sup> To show an alternative agreement existed, the plaintiff has the burden of submitting evidence of service.<sup>154</sup> If the plaintiff satisfies his burden, the defendant then has the burden of proving service was insufficient.<sup>155</sup> Here, the majority found that while the record was flush with evidence establishing an agreement was made,<sup>156</sup> the defendants presented no evidence to the contrary.<sup>157</sup>

148. *DeCook*, 875 N.W.2d at 266–69.

149. *Id.* at 268 (citing Indep. Sch. Dist. No. 273 v. Gross, 291 Minn. 158, 165, 190 N.W.2d 651, 656 (1971)); see also MINN. R. CIV. P. 15.01 (parties can amend if justice allows).

150. *DeCook*, 875 N.W.2d at 269–70. The majority also pointed out that the defendants’ only argument that they had been prejudiced was based on a loss of a statute of limitations defense. *Id.* at 269 n.5. However, as the court explained in *Nelson v. Glenwood Hills Hospitals*, loss of a statute of limitations defense on its own does not constitute prejudice for the sake of disallowing an amended summons. 240 Minn. 505, 512–16, 62 N.W.2d 73, 78–79 (1953).

151. *DeCook*, 875 N.W.2d at 272; *id.* at 272–73 (Dietzen, J., concurring in part and dissenting in part).

152. *Id.* at 270 (majority opinion).

153. *Id.*; see MINN. R. CIV. P. 3.01(b).

154. *DeCook*, 875 N.W.2d at 271 (citing Shamrock Dev., Inc. v. Smith, 754 N.W.2d 377, 384 (Minn. 2008)). Furthermore, the majority noted that a plaintiff’s burden to submit evidence of service “is a low hurdle.” *Id.*

155. *Id.*

156. See *id.*

157. *Id.* (“[The defendants] submitted no contradictory evidence.”).



C. *The Rationale of the Dissenting Opinion*

The dissent argued that no alternate agreement was made because the plaintiffs failed to produce any affirmative agreement from the defendants.<sup>158</sup> Essentially, the dissent took a literal approach to Rules 4.05 and 3.01(b) of the Minnesota Rules of Civil Procedure in its analysis.<sup>159</sup> Put another way, the dissent was concerned that the DeCooks could not provide an explicit agreement from Olmsted authorizing alternative service; they could only provide an e-mail from Graham, Olmsted's alleged agent. Furthermore, the dissent reasoned that an individual's authorization to accept service on another's behalf must be shown by *actual* authority, not just *apparent* authority,<sup>160</sup> which the dissent concluded that the DeCooks failed to do.<sup>161</sup> In other words, an individual has the authority to accept service for another only if that authority is proven, rather than assumed. The majority, however, countered that argument by deciding that once the plaintiff has produced evidence of an agreement, the burden shifts to the defendant to show the agent had only apparent authority.<sup>162</sup>

#### IV. ANALYSIS

A. *Courts Ensuring Service Gives "Reasonable Actual Notice" Would Align with the Federal Rules of Civil Procedure*

Ultimately, the *DeCook* court arrived at a fair and practical conclusion. Currently, Minnesota generally adheres strictly to the rules of service by seeking to ensure both that defendants have both actual notice of a suit and that the rules governing service are narrowly followed.<sup>163</sup> Justice, on the other hand, would be better

158. *Id.* at 274 (Dietzen, J., concurring in part and dissenting in part) ("[O]ur rules of civil procedure provide that the plaintiff must establish authority to accept service of process through the submission of a writing either signed by the defendant or electronically submitted by the defendant."); see MINN. R. CIV. P. 3.01(b), 4.05.

159. See *DeCook*, 875 N.W.2d at 272–79 (Dietzen, J., concurring in part and dissenting in part).

160. *Id.* at 277.

161. *Id.* at 276.

162. *Id.* at 272 (majority opinion).

163. See, e.g., *Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 822 (Minn. Ct. App. 1999) ("If the manner of service is not authorized by rule 4, it is not effective."); see also Jan I. Berlage, *A Clear Message Regarding Service of Process on Joint Ventures & Joint*

served if Minnesota courts focused on ensuring that service takes a form of what can be called “reasonable actual notice” to the party being sued. First, in this context, the term “reasonable” aligns most with the principle of substantial compliance.<sup>164</sup> If a party substantially complies with the rules of civil procedure governing service, then the “reasonable” element is satisfied.<sup>165</sup> Second, the term “actual notice” aligns closely with the underlying theory of notice pleading.<sup>166</sup> If service gives the defendant adequate notice of suit against it, then the “actual notice” element is satisfied.<sup>167</sup> Thus, under this proposed framework, if a plaintiff substantially complies with the rules of service and the defendant has actual notice of suit, “reasonable actual notice” is satisfied, and, in turn, service is effective.

Although the proposed “reasonable actual notice” standard would be a slight deviation from precedent, the standard would better serve Minnesota’s best interest. Currently, Minnesota precedent only considers actual notice when service is effectuated at the defendant’s place of abode.<sup>168</sup> This principal is largely derived from a case decided over twenty-five years ago: *Thiele v. Stich*.<sup>169</sup> In *Thiele*, the Minnesota Supreme Court reasoned that “no place” other than the defendant’s place of abode is “more desirable for the papers to be left.”<sup>170</sup> This idea, however, seems largely outdated. Today, people have become increasingly nomadic, relying on the internet and their phones to receive information, as

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*Enterprises—Ryan Contracting, Inc. v. JAG Investments, Inc. & Mellett v. Fairview Health Services*, 29 WM. MITCHELL L. REV. 545, 546 (2002) (“The Minnesota Supreme Court takes service of process seriously and will strictly construe the rules applicable to it.”).

164. See *Koski v. Johnson*, 837 N.W.2d 739, 743 (Minn. Ct. App. 2013) (“When a party substantially complies with Minn. R. Civ. P. 4, actual notice of the summons will subject a defendant to the jurisdiction of the court.” (internal quotations and citations omitted)).

165. See *supra* notes 41–42 and accompanying text.

166. See *supra* Section II.C.

167. See, e.g., *Minn. Mining & Mfg. Co. v. Kirkevold*, 87 F.R.D. 317, 323 (D. Minn. 1980) (“The Court has concluded that under the circumstances present here, the method of service employed by plaintiff was reasonably calculated to provide actual notice to defendant . . . [a]s defendant Kirkevold received prompt actual notice of the pendency of this action, the rules governing service should be liberally construed to uphold the service.”).

168. See *supra* notes 34, 42, and accompanying text.

169. 425 N.W.2d 580 (Minn. 1988).

170. *Id.* at 584.

opposed to mail and door-to-door visitors.<sup>171</sup> In reality, there seems to be little to no difference between actual notice at a place of abode and actual notice through other means.

Although some may point to the Minnesota Supreme Court's recent decision in *Jaeger* to argue against the substantial compliance portion of the proposed reasonable actual notice standard,<sup>172</sup> the *Jaeger* decision relied on antiquated principles set forth in the court's 1930 *MacLean* decision. The court decided *MacLean* almost ninety years ago, before the Minnesota Rules of Civil Procedure were adopted.<sup>173</sup> Moreover, the *MacLean* court discussed statutory service and not service by rule.<sup>174</sup> Although the *Jaeger* court explained that the plain language of Rule 4.03(a) supports the court's interpretation of substitute service in *MacLean*,<sup>175</sup> one can imagine that the principles behind such an old case may be less relevant today.<sup>176</sup> *Thiele*, on the other hand, was decided far more recently, in 1988.<sup>177</sup> While outdated, *Thiele* is more recent than *MacLean*; therefore, it likely better reflects current legal principles.

171. Cf. Jenara Nerenberg, *Unsettled Is Making It Possible for Families To Be Digital Nomads, Too*, FAST COMPANY (June 15, 2016, 6:50 AM), <http://www.fastcoexist.com/3060898/unsettled-is-making-it-possible-for-families-to-be-digital-nomads-too> (discussing an organization that allows individuals and families to become part of an "office-free, world-traveling life"); *Latest Telecommuting Statistics*, GLOBAL WORKPLACE ANALYTICS (Jan. 2016), <http://globalworkplaceanalytics.com/telecommuting-statistics> ("Fortune 1000 companies around the globe are entirely revamping their space around the fact that employees are already mobile. Studies repeatedly show they are not at their desk 50–60% of the time.").

172. See *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601 (Minn. 2016).

173. *Id.* at 609 ("*MacLean* predates our adoption of the Minnesota Rules of Civil Procedure . . ."). In *Jaeger*, the court explained that the statement in *Thiele v. Stich*, which suggested that substantial compliance with Rule 4 is sufficient, was only dicta and, thus, need not be followed. *Id.* at 610 (citing 425 N.W.2d 580, 584 (Minn. 1988)). Dicta or not, however, *Thiele* was decided significantly more recently than *MacLean* and therefore likely better reflects current legal principles.

174. *MacLean v. Lasely*, 181 Minn. 379, 232 N.W. 632 (1930) ("It is clear that the proof of service was made in statutory form. It is equally clear that the statutory substituted personal service was technically made.").

175. See *supra* text accompanying notes 50–53.

176. Cf. Zara Watkins, *When Is a Case Too Old To Cite?* POINTS OF INTEREST (Aug. 19, 2015), <http://www.onpointexpertise.com/interestpoints/when-is-a-case-too-old-to-cite> (discussing the proposition that the more recent the case citation, the more persuasive it is).

177. Compare *MacLean*, 181 Minn. 379, 232 N.W. 632, with *Thiele*, 425 N.W.2d 580.

This section illustrates why, and how, the proposed reasonable actual notice standard would be a better standard for Minnesota. It begins by exploring the parallels between notice pleading and service of process.<sup>178</sup> Next, this section discusses the advantages of using technology in a shifting legal landscape while drawing comparisons to Rule 23's "best notice that is practicable" standard.<sup>179</sup> Then, it contends that "reasonable actual notice" better aligns with the policy behind the Minnesota Rules of Civil Procedure.<sup>180</sup> Finally, this section introduces a slightly modified burden-shifting framework for analyzing reasonable actual notice.<sup>181</sup>

1. *The Principles of Service of Process Should Parallel the Principles of Notice Pleading*

For the most part, Minnesota has closely followed the federal construction and interpretation of the rules of civil procedure.<sup>182</sup> When the United States Supreme Court changed course and adopted a more stringent pleading standard, Minnesota had the opportunity to follow suit.<sup>183</sup> The Minnesota Supreme Court, however, declined to follow the strict "plausibility" standard and elected to apply the standard it articulated in *Franklin*.<sup>184</sup> The *Franklin* standard states that "[t]he functions of a pleading today are simply to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based . . . ."<sup>185</sup> This same principle should guide Minnesota courts' application of the rules governing service.

Currently, most methods of service are effective only if they are strictly complied with.<sup>186</sup> This creates a standard in which courts are

178. See *infra* Section IV.A.1.

179. See *infra* Section IV.A.2.

180. See *infra* Section IV.A.3.

181. See *infra* Section IV.B.

182. See *supra* text accompanying notes 41–42, 83.

183. See *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606–07 (Minn. 2014).

184. See *N. States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963); see also *Stresemann v. Jesson*, No. A13-1967, 2015 WL 7693339, at \*4 (Minn. Ct. App. Nov. 30, 2015) (affirming district court's denial of defendant's motion to dismiss while acknowledging that the information contained in plaintiff's claim would likely not defeat a motion for summary judgment).

185. *Franklin*, 122 N.W.2d at 29.

186. See, e.g., *Burke v. \$2285 U.S. Currency*, No. A09-327, 2009 WL 3427014, at

vastly more concerned with whether a method of service is strictly appropriate by rule and in theory than whether a particular method of service has real-life practicality.<sup>187</sup> This standard gives little credence to the practicality of service and largely ignores what may be best in modern day practice.<sup>188</sup> Although there are benefits to following a narrow legal interpretation—uniformity and predictability, for example<sup>189</sup>—this approach likely resolves numerous cases on technicalities rather than on the merits. Adopting a more pragmatic approach—one akin to notice pleading—would better ensure that meritorious claims do not fall through courts’ cracks.<sup>190</sup>

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\*1 (Minn. Ct. App. Oct. 27, 2009) (citing *Coons v. St. Paul Cos.*, 486 N.W.2d 771, 776 (Minn. Ct. App. 1992)) (“Service by mail requires strict compliance with Minn. R. Civ. P. 4.05 and is ineffective if an acknowledgement of service is not signed and returned by the defendant, regardless of the defendant’s actual notice of the lawsuit.”); see also 1 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE: CIVIL RULES ANNOTATED § 4:6 (5th ed. 2016) (“Rule 4 is to be strictly applied and enforced. A defect in the method of service can deprive a court of jurisdiction over a defendant. If a defendant has no actual knowledge of an action, the service methods authorized by Rule 4 are to be strictly followed.”).

187. Cf. Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1126–33 (1989) (discussing the ways in which territorial service within state boundaries can highlight impracticalities and proposing a new Rule 4 to help account for said impracticalities).

188. Cf. Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 149–51 (2001) (highlighting the difficulties the Supreme Court had with adopting clean and consistent rules for exercising personal jurisdiction over corporations); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1194–95 (2013) (discussing the practical inconsistencies with a court’s ability to exercise jurisdiction over a defendant when the defendant is simply served in the forum state).

189. See Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 612 (2001) (“Generally, rule-of-law value is present in a legal system characterized by predictability and continuity in the overall legal regime . . .”).

190. A pragmatic approach to the law is strongly supported by many prominent legal scholars. For example:

Judge Richard Posner . . . has argued that the goal of statutory interpretation should be to produce the best results for society. Judge Posner defines pragmatism, at its core, as “a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans.” Bill Eskridge similarly urges that statutory interpreters should take public values into account and construe statutes dynamically—to reflect current social, political, and legal

Both the rules governing pleading and those governing service have the same general goal: to put the party being sued on notice of the suit.<sup>191</sup> The primary function of service of process is to give a party the opportunity to appear in court and be given appropriate due process.<sup>192</sup> Likewise, the main purposes of pleadings are to notify a party of the merits of a case and give that party the opportunity to defend against them.<sup>193</sup> Although these doctrines may address slightly different concerns, each deals with the same underlying principle: giving a defendant the opportunity to defend against a claim.

Moreover, not only do the pleadings and service doctrines address the same underlying principle, they are both challenged under the same Minnesota Rule of Civil Procedure: Rule 12.<sup>194</sup> If a defendant does not include a defense of insufficient service of process in a response pleading or a separate motion to dismiss, that defense will be waived.<sup>195</sup> A defense of failure to state a claim upon

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contexts.

Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 993 (2016) (citations omitted).

191. *Compare* Mumm v. Mornson, 708 N.W.2d 475, 481 (Minn. 2006) (stating that a complaint “should put the defendant on notice of the claims against him”), with 1 HERR & HAYDOCK, *supra* note 186, § 4:4 (“The purpose of the summons is to provide notice to the defendant of the action and the effect it may have upon the interests of the defendant.”).

192. *In re Skyline Materials, Ltd.*, 835 N.W.2d 472, 475 (Minn. 2013) (“Under Rule 4, the summons or other process is the document that invokes the jurisdiction of the court, compelling the defendant to appear.” (citation omitted)).

193. *See* Wells Fargo Home Mortg., Inc. v. Newton, 646 N.W.2d 888, 899 (Minn. Ct. App. 2002) (“The purpose of the complaint is to advise the defendant as to the nature of the plaintiff’s claim.”).

194. Defenses based on pleading and service of process are both located in Rule 12.02 of the Minnesota Rules of Civil Procedure and can be made by either a responsive pleading or a separate motion. A defense that a party was not served properly is written as “insufficiency of service of process,” MINN. R. CIV. P. 12.02(d), while “failure to state a claim upon which relief can be granted” is the appropriate defense to assert against a plaintiff’s pleading, MINN. R. CIV. P. 12.02(e).

195. *See* MINN. R. CIV. P. 12.08(a) (“A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (1) if omitted from a motion in the circumstances described in Rule 12.07, or (2) if it is neither made by motion pursuant to this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course.”); *see also In re Estate of Sangren*, 504 N.W.2d 786, 789 (Minn. Ct. App. 1993) (holding that the defendant’s actual defense was insufficiency of

which relief can be granted, on the other hand, can be made at essentially any point.<sup>196</sup> However, parties often elect to assert defenses against pleadings before a trial begins, by use of a responsive pleading or a motion to dismiss.<sup>197</sup> In fact, many believe that the best time to raise a defense of failure to state a claim is at the motion to dismiss stage, before any discovery has begun.<sup>198</sup> Thus, many courts already address insufficient service of process and failure to state a claim for relief at the same juncture. In the interests of ease of proceedings and judicial economy, Minnesota would benefit from ensuring these two doctrines more closely mirror each other.

What is more, other sections of the Minnesota Rules of Civil Procedure address the Rules' overarching policy of accomplishing justice. For example, Rule 8.06 specifically declares that "[a]ll pleadings shall be so construed as to do substantial justice."<sup>199</sup> This same theme largely underlies Rule 4.<sup>200</sup> For instance, Rule 4.07

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service of process and the defendant waived that defense by failing to assert it in its answer).

196. See MINN. R. CIV. P. 12.08(b) ("A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered pursuant to Rule 7.01, or by motion for judgment on the pleadings, or at the trial on the merits.").

197. See, e.g., *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598 (Minn. 2014). In *Walsh*, the court was presented with the interesting situation in which the plaintiff, after being in default, claimed a defense of insufficiency of service of process, and the defendant turned around and asserted that complaint failed to state a claim for relief. *Id.* at 601. The court was then faced with making decisions both on the adequacy of service and the adequacy of the complaint. *Id.* at 606–07. Furthermore, the Sixth Circuit, in *Yuhasz v. Brush Wellman, Inc.*, discussed the reasoning behind the federal version of failure to state a claim: "there is no general right to discovery upon filing of the complaint. The very purpose of Fed. R. Civ. P. 12(b)(6) 'is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.'" 341 F.3d 559, 566 (6th Cir. 2003) (quoting *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987)).

198. See, e.g., Mark Thomas Smith, *Strategic Motions to Dismiss (or Lack Thereof)*, LITIG. NEWS, [https://apps.americanbar.org/litigation/litigationnews/trial\\_skills/pretrial-motion-dismiss.html](https://apps.americanbar.org/litigation/litigationnews/trial_skills/pretrial-motion-dismiss.html) (last visited Sept. 25, 2016) (advising on when the best time is to file a motion to dismiss).

199. MINN. R. CIV. P. 8.06.

200. *Tharp v. Tharp*, 228 Minn. 23, 27, 36 N.W.2d 1, 3–4 (1949) (discussing Minnesota courts' tendency to grant amendments to summons when the defendant is not prejudiced, and, in turn, finding that the summons was "fatally

allows for service to be amended, as long as no party is substantially burdened.<sup>201</sup> Both the majority and the dissent in *DeCook* mirrored this idea and wrote that a party should be able to amend a complaint as long as the defendant is not excessively burdened.<sup>202</sup> That same principle should guide a court's analysis in determining whether an alternative method of service was effective. Clearly, the defendants in *DeCook* had notice of suit and were not prejudiced, as they filed for dismissal less than three weeks after service was e-mailed to Graham.<sup>203</sup> Dismissing a case when a party has sufficient notice would be deciding that case on a "mere technicality," a problem the courts consistently strive to avoid.<sup>204</sup>

## 2. Reasonable Actual Notice Through the Use of Technology Allows for Greater Flexibility in a Shifting Legal Landscape

Thomas Jefferson may have best articulated the need to embrace change in our legal system when he said, "[a]s [society] becomes more developed . . . as new discoveries are made . . . institutions must advance also to keep pace with the times."<sup>205</sup> Often, however, the law is hesitant to adapt to societal change and growth.<sup>206</sup> Likewise, change is often not seen on a wider scale until

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defective as in effect to be no summons at all" and thus could not be amended).

201. See MINN. R. CIV. P. 4.07 ("The court in its discretion and on such terms as it deems just may at any time allow any summons or other process or proof of service thereof to be amended, unless it clearly appears that substantial rights of the person against whom the process issued would be prejudiced thereby."). Although doing substantial justice and avoiding substantial burden are slightly different doctrines, each works in concurrence with the other. For instance, it is certainly just to ensure that no party is substantially burdened, and if a party is being substantially burdened, substantial justice is likely absent.

202. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 267 (Minn. 2016); *id.* at 272 (Dietzen, J., concurring in part and dissenting in part).

203. *Id.* at 265. This is beyond the scope of this note, but this author believes that the medical industry already has significant protections in place against legal action. Arguably, medical malpractice suits do not need yet another shield in the form of mere technicalities of service. Focusing on a standard more in line with reasonable actual notice could help to level the legal playing field between the medical industry and ordinary individuals.

204. See, e.g., *Indep. Sch. Dist. No. 273 v. Gross*, 291 Minn. 158, 165, 190 N.W.2d 651, 656 (1971) ("[R]ules of civil procedure are designed to effect the settlement of controversies upon their merits rather than to terminate actions by dismissal on technical grounds.").

205. See *Thomas Jefferson Quotes*, *supra* note 1.

206. See REACTION AND RESISTANCE: FEMINISM, LAW, AND SOCIAL CHANGE



the United States Supreme Court sets a precedent that dictates change.<sup>207</sup> Every year, society becomes more and more dependent on technology, especially as technology becomes further ingrained in law and all facets of life.<sup>208</sup> Thus, an official recognition of e-mail as a sufficient alternative method of service as recent as 2015 is encouraging, but fairly surprising.<sup>209</sup> Whether service should be allowed through electronic means is the subject of much debate.<sup>210</sup> When new methods arrive that can reasonably notify a party of an impending action, the rules governing service should be liberally construed.<sup>211</sup>

Minnesota embraced this increasing prevalence of e-mail in 2015 when the judiciary committee amended Rule 3 of the Minnesota Rules of Civil Procedure to specify that service may be accomplished via alternative forms, including e-mail, if consented to.<sup>212</sup> Notably, however, neither Rule 3 (governing the commencement of an action) nor Rule 4 (governing service) of the Federal Rules of Civil Procedure mentions the use of e-mail.<sup>213</sup> Similar to notice pleading, Minnesota Rule 3.01(b) and the accompanying committee note show the Minnesota court system's

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(Dorothy E. Chunn, Susan B. Boyd, & Hester Lessard eds., 2007) (discussing the resistance that courts have faced in developing feminism into law and policy); *see also Radcliffe Panel Focuses on Law and Social Change*, HARV. MAG. (May 25, 2012), <http://harvardmagazine.com/2012/05/radcliffe-day-panel-focuses-on-law-social-change> (highlighting a panel that discussed how law relies on non-legal social activists while social activists would not spur change as much without the court).

207. *See* Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change*, 89 B.U. L. REV. 589, 602 (2009) (arguing that the court has the power and the duty to play a "catalytic role" in spurring social change). *But see* Michael Klarman, Lecture at the Georgetown Law Center's Philip A. Hart Memorial Lecture: Courts, Social Change, and Political Backlash (Mar. 31, 2011) (transcript available at <http://scholarship.law.georgetown.edu/hartlecture/2>) (highlighting instances of backlash to historic Supreme Court decisions).

208. *See generally* Yvonne A. Tamayo, *Are You Being Served?: Email and (Due) Service of Process*, 51 S.C. L. REV. 227 (2000).

209. *See* MINN. R. CIV. P. 3.01(b).

210. *See supra* Section II.B.2.

211. *Cf.* Zuckerman v. McCulley, 7 F.R.D. 739, 740 (E.D. Mo. 1947) ("It has been held that the Rule on service should be construed liberally to effectuate service where actual notice of suit has been received by the defendant."), *aff'd*, 170 F.2d 1015 (8th Cir. 1948).

212. *See* MINN. R. CIV. P. 3.01(b) advisory committee's comment to amendment.

213. *Compare* MINN. R. CIV. P. 3.01, *and* MINN. R. CIV. P. 4, *with* FED. R. CIV. P. 3, *and* FED. R. CIV. P. 4.

willingness to adopt a more pragmatic approach to its rules.<sup>214</sup> As the legal landscape continues to shift and change, all courts would be well served by embracing a similar pragmatic approach.

Service by publication illustrates a method of service that would benefit from technology's aid. Service by publication may be used only if it falls into one of the five categories presented in Rule 4.04(a).<sup>215</sup> Furthermore, notice by publication continues to be measured under *Mullane's* "reasonably calculated" standard.<sup>216</sup> Minnesota courts, however, have stringently stuck to the text of the rule and have not yet allowed for electronic notice by publication under *Mullane's* standards.<sup>217</sup> However, in present society, a defendant's behavior does not always line up with the rigid rules of service.<sup>218</sup> For example, the current rules governing service of process often fall short when a defendant elects to evade service.<sup>219</sup> With that in mind, technology-assisted service by publication may be better suited to notify a defendant of suit.<sup>220</sup> As one commentator put it, "[t]he rigid construction of the current rule seeks to protect the defendant's right to due process, but as modern society changes, it does so at the cost of fairness and

214. See *supra* note 57 and accompanying text.

215. MINN. R. CIV. P. 4.04(a). The five reasons are as follows: (1) a defendant has left the state to avoid service; (2) a plaintiff acquired a lien; (3) the action is for divorce and the court requires publication; (4) the action involves real or personal property; or (5) the action involves a foreclosure or real estate lien. *Id.*

216. See *Dusenbery v. United States*, 534 U.S. 161, 173 (2002) (noting that "[d]ue process requires no more" than the reasonableness of service inquiry from *Mullane*).

217. See *Klander*, *supra* note 38, at 250 (discussing that the Minnesota Supreme Court had an opportunity to "reevaluate the elements of an archaic rule and perhaps broaden them to reflect modern communication" in *Shamrock Development, Inc. v. Smith*, 754 N.W.2d 377 (Minn. 2008), but instead "articulated a stricter interpretation of the rule").

218. See *id.* at 252. A clear example arises when a defendant is evading service but not doing so in a way that fits into the rigid five scenarios outlined in Minn. R. Civ. P. 4.04(a).

219. *Id.* ("[W]hen the methods for providing notice do not conform to actual behavior, due process becomes a loophole, rather than a safeguard, for defendants to evade service.").

220. See Christopher B. Woods, *Commercial Law: Determining Repugnancy in an Electronic Age: Excluded Transactions Under Electronic Writing and Signature Legislation*, 52 OKLA. L. REV. 411, 444 (1999) ("Electronic publication . . . could actually offer a greater likelihood of providing notice than the traditional method of service by publication.").

judicial efficiency.”<sup>221</sup> Ignoring technology’s use and place in society may cause negative effects in fairness and efficiency.<sup>222</sup>

Rather than ignoring technology, Minnesota’s rule governing service by publication specifically acknowledges technology’s place in law in its 2015 amendment.<sup>223</sup> Rule 4.04 allows courts to accept documents as long as the party signs them under threat of perjury.<sup>224</sup> The committee included this amendment in acknowledgement of the difficulty and burden of procuring notarization for e-filed and e-served documents.<sup>225</sup> The 2015 amendment to Rule 4.04 again demonstrates Minnesota’s willingness to abandon outdated, technical portions of rules and embrace an approach that accounts for technology’s effects.

Taking that approach one step further, some commentators suggest that electronic service should be allowed in most circumstances.<sup>226</sup> For instance, one commentator, Jessica Klander, contends that the internet’s prevalence in today’s society will eventually create the situation where businesses and individuals will have more recognizable online addresses than physical addresses.<sup>227</sup> Therefore, an individual will likely be online much more often than he is at home or checking his physical mailbox.<sup>228</sup> In addition, Klander asserts that refusing to allow electronic service may be unconstitutional, as it is the most reasonably calculated way to

221. Klander, *supra* note 38, at 254.

222. *Id.*

223. See MINN. R. CIV. P. 4.04 advisory committee’s note to 2015 amendment.

224. *Id.* (stating that “Rule 4.04 is amended to implement a new statute directing the courts to accept documents without notarization if they are signed under the following language: ‘I declare under penalty of perjury that everything I have stated in this document is true and correct’” (quoting MINN. STAT. § 358.116 (2014))).

225. See *id.* (“The statute allows the courts to require specifically, by rule, that notarization is necessary. The difficulty in accomplishing and documenting notarization for documents that are e-filed and e-served militates against requiring formal notarization, and notarization often places a significant burden on self-represented litigants.”).

226. See, e.g., Klander, *supra* note 38.

227. See *id.* at 257. Klander makes the compelling point that with use of the internet increasing exponentially, many individuals will soon have a more reliable online address than home address. *Id.* She invokes the example of *Rio Properties*, where plaintiffs were only able to find an online address for the business, and thus electronic service was approved. *Id.* (discussing *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007 (9th Cir. 2002)); see also *supra* note 73 (same).

228. Klander, *supra* note 38, at 257–58.

notify a defendant of a suit.<sup>229</sup> Furthermore, another commentator, Rachel Cantor, suggests that service via the internet will not only be more convenient, it will be safer, cheaper, and more reliable.<sup>230</sup> These assertions demonstrate a portion of the legal community's view that the best methods of service are evolving and may not currently be in place—a view the courts should not ignore.

Although not directly comparable, notice standards in class action suits also demonstrate the impact and benefit technology can have in notifying individuals of suit. As previously discussed, use of the “best notice practicable” standard in class action lawsuits reflects the legal system's willingness to embrace the use of technology.<sup>231</sup> In many situations, class members are difficult to identify, locate, and notify of the action. Thus, a number of courts have held that notice to class members via technological means is the best practicable way to notify potential class members of the suit.<sup>232</sup> The law governing class actions, sticking almost exclusively to notice by mail or notice by publication, did not always embrace these means.<sup>233</sup> Now, however, facing increases in class action suits and sophistication of technologies, courts are embracing use of technology in class notification.<sup>234</sup>

Service of process standards, in many respects, parallel the progression of notice standards governing class action suits. As individuals move away from traditional addresses and focus more on their online presence, courts will be faced with new challenges

229. *Id.* at 260 (“Electronic communication has caused the foundation of Minnesota Rule 4.03 to become archaic, and the evidence of the numerous judicial and public policy benefits indicates the need for statutory reform. In fact, the lack of electronic alternatives to service of process may very well be an unconstitutional oversight.”).

230. See Rachel Cantor, *Internet Service of Process: A Constitutionally Adequate Alternative?*, 66 U. CHI. L. REV. 943, 965–66 (1999) (discussing the ways in which internet service “has the potential to be more secure, . . . more reliable,” and cheaper).

231. See *supra* note 79–82 and accompanying text.

232. See, e.g., *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir. 2004); *Keirsey v. eBay, Inc.*, No. 12-cv-01200-JST, 2014 WL 644697 (N.D. Cal. Feb. 14, 2014); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004).

233. See generally *Mirfasihi*, 356 F.3d at 786 (“[N]ewspaper notice alone is not always an adequate alternative to individual notice. The World Wide Web is an increasingly important method of communication, and, of particular pertinence here, an increasingly important substitute for newspapers.” (internal citations omitted)).

234. See *supra* note 79 and accompanying text.

regarding service of process standards.<sup>235</sup> With that in mind, it is likely only a matter of time before the Minnesota Supreme Court further authorizes use of technology in service of process. If Minnesota adopts the standard of “reasonable actual notice,” this transition will be significantly smoother, as the standard will already account for use of technology.

For example, in 2008, an Australian court authorized the service of documents via Facebook.<sup>236</sup> The court came to this decision after the plaintiffs attempted—eleven times—to personally serve the defendants but failed.<sup>237</sup> The Australian court, considering the circumstances, found that serving the defendants via Facebook offered the best opportunity to give the defendants notice.<sup>238</sup> This Note is in no way suggesting that service via Facebook should be authorized in a blanket fashion. However, Minnesota would be well served to take a page out of this Australian case’s book and allow service by any means if it gives the defendant “reasonable actual notice.”

### 3. *Reasonable Actual Notice Aligns with the Policy of the Minnesota Rules of Civil Procedure*

When considering a rule, the court should not be handcuffed to only determining its plain meaning; rather, the court must also consider the intent behind the adoption of the rule.<sup>239</sup> In doing so, the court should seek to rule in a manner that is most in accord with public policy.<sup>240</sup> The majority in *DeCook*, in its discussion, took both of these areas into consideration when it invoked the 2015

235. See *supra* note 79 and accompanying text.

236. See Andriana L. Shultz, *Superpoked and Served: Service of Process Via Social Networking Sites*, 43 U. RICH. L. REV. 1497, 1497 n.1 (2009) (discussing the 2008 Australian case).

237. *Id.*

238. *Id.*

239. See *Vandenheuvel v. Wagner*, 673 N.W.2d 524, 525 (Minn. 2004) (“Rules of court are to be interpreted in the same manner as statutes and are to be ‘construed in the sense in which they were understood and intended at the time the rule was promulgated.’” (quoting *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997))).

240. Cf. MINN. R. CIV. P. 1 (“The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties’ resources, and complexity and importance of the issues at stake in the litigation.”).

amendment to Rule 3.01(b) to support its decision.<sup>241</sup> Although the dissent in *DeCook* argued that 3.01(b)'s 2015 amendment was not in effect when the claim was brought and was thus irrelevant,<sup>242</sup> the amendment largely displayed the then-current state of the law. Thus, the majority pragmatically considered the notions of intent and public policy in invoking a more fluid interpretation of the law.

Moreover, in general, the Minnesota Rules of Civil Procedure give ample discretion to judges in adjudicating disputes.<sup>243</sup> In order to enforce the policies behind the rules of procedure, judges are given substantial discretion in many situations.<sup>244</sup> In fact, one study reviewing a number of Minnesota statutes and rules found as many as 293 instances of judicial discretion in the Minnesota Rules of Civil Procedure.<sup>245</sup> Rule 4, governing service, includes provisions giving discretion to the court.<sup>246</sup> For instance, Rule 4.03(e), governing personal service to public corporations, provides that if service cannot be effectuated according to the enumerated ways in section (e), "the court may direct the manner of such service."<sup>247</sup> In addition, Rule 4.04(c)(3), governing service outside the United States, allows the court to direct service by means "not prohibited by international agreement."<sup>248</sup> And finally, Rule 4.07, governing amendments to service, gives the court discretion to "allow any summons or other process or proof of service thereof to be amended . . . ."<sup>249</sup>

241. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 270 n.8 (Minn. 2016); *see also* *N. Pac. Ry. Co. v. City of Duluth*, 243 Minn. 84, 88, 67 N.W.2d 635, 638 (1954) ("The expression of one thing is the exclusion of another."). One could argue that the *DeCook* court, construing the intent of the rules at the time of adoption, did not find it valid to accept alternative e-mail service until the 2015 amendment was put into place.

242. *DeCook*, 875 N.W.2d at 276 (Dietzen, J., concurring in part and dissenting in part).

243. *See, e.g.*, MINN. R. CIV. P. 4.03(e), .04(c)(3), .07.

244. According to *Black's Law Dictionary*, "judicial discretion" is defined as "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law . . . ." *Judicial Discretion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

245. *See* Stephen C. Aldrich & Michael Cass, *Judicial Discretion Melding Messy Facts and Pristine Law*, BENCH & B. MINN. (Nov. 11, 2013), <http://mnbenchbar.com/2013/11/judicial-discretion/>.

246. *See* MINN. R. CIV. P. 4.

247. MINN. R. CIV. P. 4.03(e).

248. MINN. R. CIV. P. 4.04(c)(3).

249. MINN. R. CIV. P. 4.07.

Reasonable actual notice would continue to give the court ample discretion in determining if service was valid. Currently, as discussed in the preceding paragraph, the Minnesota rules provide a fair amount of discretion in its rules governing service.<sup>250</sup> Notice pleading similarly gives the court discretion in determining if a complaint gave the defendant sufficient notice of suit.<sup>251</sup> The term “actual notice” in the proposed reasonable actual notice standard is akin to the standard governing notice pleading.<sup>252</sup> Thus, the court would be given substantial discretion in determining whether service gave sufficient notice to the defendant and, in turn, whether the defendant had “actual notice.” In addition, the term “reasonable” seeks to determine if the rules of service were substantially complied with.<sup>253</sup> With substitute service, the court again has discretion in determining whether the individual served is a person of “suitable age and discretion.”<sup>254</sup> Therefore, in many instances, the court will have discretion in determining whether service was substantially complied with—thus aligning with the discretionary policy behind Rule 4 and the rules of civil procedure.

From the opening of the rules, the court is tasked with issuing rulings that are “just.”<sup>255</sup> Rule 1 of the Minnesota Rules of Civil Procedure sets out the “Scope of [the] Rules” and states that the Minnesota Rules of Civil Procedure “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”<sup>256</sup> Recently, Rule 1’s 2013 amendment added more factors to ensure the judicial system’s resources are not abused.<sup>257</sup> Generally, courts approach the rules in such a way as to ensure that disputes are resolved on merits and not

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250. See *supra* notes 243–49 and accompanying text.

251. See MINN. R. CIV. P. 8.06 (“All pleadings shall be so construed as to do substantial justice.”).

252. See *supra* text accompanying notes 166–67.

253. See *supra* text accompanying notes 164–65.

254. See, e.g., *Holmen v. Miller*, 296 Minn. 99, 105, 206 N.W.2d 916, 920 (1973) (rejecting the argument that an individual served at the age of thirteen is presumptively not of suitable age and discretion and finding that the defendant did not offer evidence to show the thirteen-year-old was not of a suitable age and discretion).

255. See MINN. R. CIV. P. 1 (stating the policy behind all civil decisions).

256. *Id.*

257. See 1 HERR & HAYDOCK, *supra* note 186, § 1.2 (“The overarching goal of this provision is to create savings of expense, time of the litigants, and time of the courts.”).

on mere technicalities.<sup>258</sup> A reasonable actual notice standard would better reach this goal.

If courts were to embrace the reasonable actual notice standard for service, judicial economy would benefit. Judicial economy is an ever-increasing concern to the American legal system.<sup>259</sup> There are only so many judges and hours available to referee disputes; nonetheless, each year a staggering number of Americans petition for the help of the courts.<sup>260</sup> Significantly, district courts must rule on motions to dismiss for insufficient service of process. In doing so, they are handcuffed to forming their analysis strictly around the lettering of Rule 4.<sup>261</sup> When a party succeeds in a motion to dismiss for insufficient service of process, the case is most often dismissed without prejudice.<sup>262</sup> This allows a plaintiff to re-file his suit, starting the entire judicial process over again.<sup>263</sup> Presumably, this wastes significant time and resources of

258. *Indep. Sch. Dist. No. 273 v. Gross*, 291 Minn. 158, 165, 190 N.W.2d 651, 656 (1971) (“[W]e must . . . be guided by the principle that rules of civil procedure are designed to effect the settlement of controversies upon their merits rather than to terminate actions by dismissal on technical grounds. To that end, Rule 41.01 should be construed liberally, if possible, to avoid depriving a litigant of his day in court.”).

259. *See, e.g., United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (“Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . .”).

260. *See Infographic: Lawsuits in America*, COMMON GOOD (July 17, 2012), <http://www.commongood.org/blog/entry/infographic-lawsuits-in-america> (noting that each year fifteen million civil cases are filed in the United States); *State Court Caseload Statistics*, BUREAU OF JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=30> (last visited Sept. 5, 2016) (profiling a record high of 102.4 million criminal and civil cases that were filed to state courts in 2006); *cf. Kevin LaCroix, U.S. Securities Class Action Lawsuit Filings in 2015 at Highest Level in Years*, THE D&O DIARY (Jan. 3, 2016), <http://www.dandodiary.com/2016/01/articles/securities-litigation/u-s-securities-class-action-lawsuit-filings-in-2015-at-highest-level-in-years/> (explaining why securities class action lawsuits were filed at such a high level in 2015).

261. *See, e.g., Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 822 (Minn. Ct. App. 1999) (“If the manner of service is not authorized by rule 4, it is not effective.”).

262. *See, e.g., Lewis v. Contracting Nw., Inc.*, 413 N.W.2d 154, 156 (Minn. Ct. App. 1987) (“The proper action to be taken by the court, if it finds insufficient service of process, is to dismiss the action without prejudice.” (quoting 1 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE: CIVIL RULES ANNOTATED § 12.8 (1985) (emphasis omitted))).

263. *See Dismissal Without Prejudice*, BLACK’S, *supra* note 244 (defining dismissal



both the court and the parties involved—resources that would be better spent adjudicating the merits of the case. Thus, such a strict interpretation around the rules of service quite possibly leads to less, not more, efficiency.

The reasonable actual notice standard would give courts the breathing room needed to adjudicate cases more efficiently. Currently, as discussed above, the courts may only deem service effective if the method of service is clearly stated in the rule or an alternative method of service has been proven.<sup>264</sup> The current method leaves out an array of situations where an individual may have substantially complied with the rules of service, the defendant was on notice of the suit, and yet the case was dismissed because the service did not follow the black letter of the law.<sup>265</sup> Reasonable actual notice, however, would allow a party to prove that it did, in fact, substantially comply with the rules of service, the defendant had knowledge of the suit, and, thus, service was proper.<sup>266</sup> The court, then, has the opportunity to measure the level of compliance with the reasonable actual notice standard against numerous other factors, such as time, money, and the court's resources. Therefore, reasonable actual notice would help prevent the logjam of cases, repeated dismissals, and refileing of claims that often occur in Minnesota courts.<sup>267</sup> With those principles in mind, reasonable actual notice could lead to a more efficient judicial system without sacrificing judicial integrity.

*B. The Reasonable Actual Notice Burden-Shifting Framework Would Not Signal a Significant Departure from the Current Burden-Shifting Framework*

The focus on which party carries the burden of proving effective service in *DeCook* is not misplaced.<sup>268</sup> If a plaintiff claims an alternative method of service was effective, the court looks to a

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without prejudice as “[a] dismissal that does not bar the plaintiff from refileing the lawsuit within the applicable limitations period”).

264. See, e.g., *Allen*, 590 N.W.2d at 822.

265. See, e.g., *In re Disciplinary Action Against Coleman*, 793 N.W.2d 296, 302 (Minn. 2011); *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

266. See *infra* Section IV.B.

267. See *supra* notes 261–65 and accompanying text.

268. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 272 (Minn. 2016); *id.* at 272–73 (Dietzen, J., concurring in part and dissenting in part).

burden-shifting framework in its analysis.<sup>269</sup> First, the plaintiff has the burden to produce evidence of an agreement between the parties.<sup>270</sup> Then, the burden shifts to the defendant to show that no agreement exists and, thus, service was ineffective.<sup>271</sup>

Minnesota courts, however, should focus less on proving whether an alternative method of service was consented to and more on whether the service gave reasonable actual notice. If Minnesota courts were to adopt the proposed reasonable actual notice standard, a slightly modified burden-shifting framework should apply. First, the plaintiff should carry the burden to show he made a good faith effort to comply with the rules of service<sup>272</sup> and provided the defendant with reasonable notice of legal action.<sup>273</sup> Then, the burden should shift to the defendant to show that: (1) the plaintiff did not act in good faith;<sup>274</sup> (2) the defendant did not have reasonable actual notice of legal action;<sup>275</sup> or (3) the defendant was excessively burdened by the method of service.<sup>276</sup> Although defendants should continue to carry a higher burden of persuasion,<sup>277</sup> having three potential alternative arguments would give them ample opportunity to establish a viable defense. Overall, this method would better serve the legal system's goal of ensuring conflicts are resolved on their merits—not on mere technicalities.<sup>278</sup>

## V. CONCLUSION

There are many observers and commentators on both sides of the service aisle.<sup>279</sup> Some take a fairly strict view of service;<sup>280</sup> others

269. See *supra* text accompanying note 58–61.

270. See *Shamrock Dev., Inc. v. Smith*, 754 N.W. 2d 377, 384 (Minn. 2008).

271. *Id.*

272. Cf. *Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co.*, 60 Minn. 142, 144–45, 62 N.W. 115, 116 (1895) (holding that when a plaintiff invites a defendant into the forum state to settle a dispute, service will not be proper unless made in good faith by the plaintiff).

273. See *supra* Section IV.A.

274. Cf. *Columbia*, 60 Minn. at 145, 62 N.W. at 116.

275. See *supra* Section IV.A.

276. See MINN. R. CIV. P. 4.07.

277. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 271 (Minn. 2016).

278. See, e.g., *Indep. Sch. Dist. No. 273 v. Gross*, 291 Minn. 158, 164, 190 N.W.2d 651, 655 (1971).

279. Cf. Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 13 (2000) (“[S]trict or liberal construction can be found in cases arising under statutes spanning almost the entire alphabet—from

take a rather pragmatic view.<sup>281</sup> Each side, however, can likely agree that the rules of civil procedure exist to ensure that the courts have the ability to give substantial justice.<sup>282</sup> Courts are often tasked with solving difficult issues of service.<sup>283</sup> These issues include anything from defendants evading service<sup>284</sup> to determining whether to allow amendments to service<sup>285</sup> or deciding whether service was effective.<sup>286</sup> These issues can lead to disputes and jam the courthouse doors.<sup>287</sup> Minnesota courts could take a step in the direction of efficiency and justice by adopting the “reasonable actual notice” standard.

Some may point to this standard as carrying its fair share of risks. Most evidently, plaintiffs may attempt to take advantage of what some could interpret as a more relaxed standard of service.<sup>288</sup> Currently though, the legal system often finds itself wrestling with defendants evading service,<sup>289</sup> leaving plaintiffs with fewer options to satisfy due process requirements. In addition, the proposed modified burden-shifting framework that goes along with reasonable actual notice would operate to counteract any perceived advantage given to plaintiffs.<sup>290</sup> Thus, the reasonable actual notice standard would not be advantageous to either the plaintiff or the

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Adoption to Unemployment Compensation.”).

280. Cf. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990) (arguing that all criminal statutes should be strictly construed).

281. See, e.g., Klander, *supra* note 38, at 250 (opining that the Minnesota Supreme Court missed an opportunity to reevaluate an archaic rule).

282. See MINN. R. CIV. P. 1 (“[The rule] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”).

283. See, e.g., DeCook v. Olmsted Med. Ctr., Inc., 875 N.W.2d 263 (Minn. 2016).

284. See, e.g., *In re Int’l Telemedia Assocs., Inc.*, 245 B.R. 713, 718 (Bankr. N.D. Ga. 2000).

285. See, e.g., Tharp v. Tharp, 228 Minn. 23, 27, 36 N.W.2d 1, 3–4 (1949).

286. See *supra* text accompanying note 41.

287. See, e.g., *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

288. Cf. James Comber, Gareth Hughes & Emily Austin, *Playing by the Rules or Playing Games? The Risks of Taking Advantage of an Opponent’s Mistakes in Litigation*, ASHURST (June 2016), [https://www.ashurst.com/publication-item.aspx?id\\_Content=13235](https://www.ashurst.com/publication-item.aspx?id_Content=13235) (“Both the English and Hong Kong cases highlight that parties must ensure litigation is conducted efficiently and avoid game playing over procedural errors by opponents.”).

289. See *supra* notes 219–20 and accompanying text.

290. See *supra* Section IV.B.

defendant; rather, the standard would be advantageous to the justice system as a whole.

The reasonable actual notice standard would aid Minnesota's legal system in its continued oversight of the principles governing service. Whether it be discussing the merits of alternative service in *DeCook*,<sup>291</sup> or actual notice in *Jaeger*,<sup>292</sup> issues of service are clearly at the forefront of our legal landscape. Typically, the legal system strives to make doctrinal changes in gradual, incremental fashion.<sup>293</sup> This allows courts to be adaptive while still cautioning against making brash, knee-jerk decisions that will seem outdated within a few years.<sup>294</sup> The proposed "reasonable actual notice" standard accounts for that concern by implementing a broad rule that allows courts to continue to substantially stick to the rules of civil procedure and precedent while remaining flexible for what is most in accord with justice.<sup>295</sup> The alternative, relying on future Supreme Court decisions to interpret and overrule previous cases, has the potential to implement far reaching change, but it may not age well, and it may even lead to more uncertainty and unreliability in service. Adopting the proposed "reasonable actual notice" standard alongside a slightly modified burden-shifting framework, however, could operate to make our justice system fairer through a relatively small, incremental change.

291. *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263 (Minn. 2016).

292. *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 609 (Minn. 2016).

293. Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 816 (2010) ("Since legislatures, courts, executive officers, administrative agencies, and even voters interact, incremental lawmaking is often the strategy most respectful of each player's role . . . . Leading commentators encourage incrementalism.").

294. *Cf.* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362–66 (2006) (discussing the doctrine of judicial minimalism, which encourages judges to make small changes and avoid broad sweeping rulings).

295. *See supra* Part IV.

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